

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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In the Matter of  
Billed Party Preference  
for 0+ InterLATA Calls

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)  
) CC Docket No. 92-77  
)

REPLY COMMENTS OF CAPITAL NETWORK SYSTEM, INC.

CAPITAL NETWORK SYSTEM, INC.

Randolph J. May  
David A. Gross  
Elizabeth C. Buckingham

SUTHERLAND, ASBILL & BRENNAN  
1275 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2404  
(202) 383-0100

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Its Attorneys

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## SUMMARY

The Commission should reject promptly all proposals to mandate the implementation of billed party preference. The record evidence shows that BPP would be a multibillion dollar boondoggle, with projected implementation costs of more than \$1 billion and recurring costs in excess of \$500 million per year. Even these staggering estimates dramatically understate BPP's actual implementation costs since many parties supplied only partial cost estimates and others provided no cost estimates at all. As certain LECs have now recognized, BPP's tremendous costs means that BPP can never be an economically viable service, and if required to be implemented by the FCC, it would require massive, improper cross-subsidization in the form of increased rates for non-BPP services.

In addition, BPP should be rejected because it would not offer callers the universal access to their preferred OSPs that is now possible with "800" and "950" access numbers and increasingly with "10XXX" access codes. No BPP supporter is proposing anything close to universal implementation. Coin-sent paid, international, and credit card calls would not be covered initially -- if ever -- by the BPP proposals. Because many smaller LECs and IXC's would not be able to afford to implement BPP, callers would not know whether or not their calls are being routed using BPP. Importantly, because of jurisdictional restrictions, the Commission cannot order intrastate BPP. As a result, it is unlikely that, because of its high costs and lack of public benefits, BPP would be required by state commissions for intrastate calls.

Moreover, BPP is not in the public interest because it would result in fewer payphones being available to the public and calls would take significantly longer to complete. Since BPP would render smart payphone technology worthless and would not allow many other payphone owners to make an adequate return on their investment, the number of public telephones available to callers would decrease if the FCC were to order implementation of BPP. Not only would this inconvenience callers but, in urban areas where many residents do not have telephones in their homes, this could jeopardize their safety by imperiling access to emergency services. Calls would take longer to complete if BPP were implemented because most callers would have to speak to two separate operators. The record shows that delays in call processing would outweigh any time savings achieved by callers not having to dial an access code. Thus, BPP offers no service benefits, only customer frustration and delayed calls.

Furthermore, billed party preference should not be mandated because it would have a profoundly anticompetitive impact on the provision of telecommunications services. The record demonstrates that there is no viable means of selecting

regional carriers as a caller's primary OSP. None of the nationwide OSPs have volunteered to serve as the secondary carrier for these smaller OSPs, preferring instead to divide the primary OSP market among themselves. This could eliminate the most innovative segment of "0+" carriers and leave consumers and businesses with an oligopolistic marketplace -- a result that would be clearly contrary to the public interest.

In sum, the Commission should not require the implementation of a billed party preference system because it would provide little or no real benefits for callers since they can already reach their preferred carriers, because BPP would cost billions of dollars in non-recurring and recurring costs that would require massive and improper cross-subsidization, because BPP could never be implemented on a universal basis, because it would delay call completion and eliminate competition within both the "1+" and "0+" interexchange markets, and because it would be arbitrary and capricious agency action in violation of the Administrative Procedure Act.



instead confuse and frustrate callers as to its availability. Where implemented, billed party preference would degrade service quality both by delaying call completion and by requiring many callers to speak to two operators. It could also threaten public safety by reducing the number of telephones available to the public. Rather than increasing competition, BPP implementation would likely lead to the elimination of regional "0+" and "1+" carriers and would result in a "Big Three" interexchange carrier ("IXC") oligopoly of both the interLATA operator services market and the direct dial market. It could also force out of business manufacturers and owners of smart pay telephones.

3. In light of these facts, it would be arbitrary and capricious and inconsistent with the public interest for the Commission to implement billed party preference. In addition, federally-mandated implementation of billed party preference would be contrary to important Commission policies against excessive and counterproductive regulation and would be an unconstitutional taking of property in violation of the Fifth Amendment. As described more fully below, the Commission should reject all proposals to implement billed party preference.

**II. BECAUSE OF ITS STAGGERING COSTS AND  
LIMITED BENEFITS THE COMMISSION CANNOT  
LAWFULLY MANDATE BILLED PARTY PREFERENCE**

4. Based on the cost figures submitted in this proceeding, the Commission cannot lawfully implement billed party preference. To do so would be clearly arbitrary and capricious and inconsistent with the public interest. As shown in the attached

Appendix, the preliminary estimates already in the record show that billed party preference would cost at least \$1,037,234,041 to implement and at least \$507,441,167 per year in recurring costs to operate. To put such an enormous figure into perspective, implementation of billed party preference would be the equivalent of imposing a \$4 tax on every man, woman and child in the country, <sup>2/</sup> and then continuing to collect an annual tax of over \$2 per person just to operate the BPP system. These estimates of enormous new costs to be imposed on the American people are likely to be much too low, as those companies supplying the cost estimates have carefully stated that their estimates are "soft," incomplete, underinclusive, and likely to rise -- perhaps substantially.

5. All parties supplying cost estimates emphasized the preliminary and sketchy nature of their information. <sup>3/</sup> As an illustration of the imprecision of those estimates, Southwestern Bell Telephone Company ("Southwestern Bell") reported that its BPP vendor price estimates jumped 68% in the two weeks just before filing its comments -- from \$75 to \$127 million -- and that even these revised figures were termed "soft" by its

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<sup>2/</sup> In 1990, the U.S. population totalled 248,709,873. Department of Commerce, Bureau of the Census, Economics and Statistics Administration, CB91-100 at 3 (released March 11, 1991).

<sup>3/</sup> See, e.g., BellSouth Telecommunications, Inc. ("BellSouth") at 11; Pacific Bell and Nevada Bell ("Pacific Bell") at 20, 22. As stated by Pacific Bell, "estimating costs for deployment of a system not yet developed is speculative." Pacific Bell at 19.

vendors. <sup>4/</sup> The estimates that have been provided also omit many necessary initial implementation and recurring expenses. For example, Southern New England Telephone ("SNET") did not include in its recurring cost estimates the additional operator salaries, overhead, or billing costs required to operate a BPP system. <sup>5/</sup> Sprint, one of the strongest billed party preference supporters, has provided the Commission with no recurring cost estimates and its projected \$53,134,000 implementation costs <sup>6/</sup> did not include the line information data base ("LIDB") software modifications needed to implement billed party preference. <sup>7/</sup>

6. Furthermore, the estimated total costs of BPP are significantly understated because many of the parties affected by billed party preference did not provide any cost information at all. For example, most independent LECs provided no cost estimates, although the Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO") did state that the upgrades necessary to implement billed party preference for small carriers could total as much as \$600,000 per end office. <sup>8/</sup> MCI Telecommunications Corporation ("MCI"), another BPP supporter, provided no cost information whatsoever regarding the costs for it (as an operator service provider ("OSP")) to

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<sup>4/</sup> Southwestern Bell Telephone at 10.

<sup>5/</sup> SNET at 2.

<sup>6/</sup> Sprint at Exhibit B.

<sup>7/</sup> Id. at 20 n.13.

<sup>8/</sup> OPASTCO at 4 n.2.



implement BPP. The same is true for many smaller OSPs. If the estimates already in the record for BPP were supplemented to include complete system-wide costs, the estimated \$1,000,000,000 plus costs would increase substantially. As a result, even many LECs believe that, after billions of dollars of investment, BPP would never be an economically viable service and that BPP should not be required by the Commission. <sup>9/</sup> Those LECs that argue that BPP should be mandated generally recognize that it can be economically supported only by increasing the rates substantially for services not directly associated with BPP and paid for by ratepayers other than those using BPP services, i.e., by requiring cross-subsidization of BPP. <sup>10/</sup>

7. The comments filed in this proceeding by many of the LECs establish that the limited, purported benefits of billed party preference could never justify its costs. The Nynex Telephone Companies ("Nynex"), for example, have concluded that "on balance, the costs of billed party preference outweigh the benefits to the public" because the "significant implementation costs and ongoing expenses make it uneconomical as a new service." <sup>11/</sup> GTE basically agreed, stating that, "traffic volumes for BPP may not be sufficient to fully recover these

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<sup>9/</sup> See, e.g., BellSouth at 19 ("In light of the changing character of the market, substantial implementation costs and a probable waiting period of several years before the service could be deployed, BellSouth does not believe that the public interest will be served by mandating BPP at this time.")

<sup>10/</sup> See, e.g., SNET at 1-2; GTE at 12-13; Bell Atlantic at 6-7.

<sup>11/</sup> Nynex at 3-4.

costs . . . [and] the costs and resultant per call charge for BPP may simply be too high to sustain in the market." <sup>12/</sup> SNET reached a similar conclusion: "Given the high costs for BPP, it may well be impossible to price this service at what could be considered a 'reasonable' price level . . . ." <sup>13/</sup>

8. Indeed, the huge implementation costs have caused one Bell Operating Company ("BOC") to switch its position regarding the desirability of BPP. As recently as last November, BellSouth stated that it "strongly believes that there is a continuing need for universal BPP service from public payphones." <sup>14/</sup> In its comments filed in this proceeding, BellSouth now concludes that in light of, inter alia, the "substantial implementation costs," BPP should not be implemented. <sup>15/</sup>

9. As shown in Section IV below, since BPP does not generate any other real public benefits to offset its enormous costs, the Commission cannot lawfully order its implementation. <sup>16/</sup> To do so in the face of the record evidence

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<sup>12/</sup> GTE at 12. See also US West at 3 (without, inter alia, full cost recovery, "billed party preference will result in the needless expenditure of huge sums while at the same time exacerbating what confusion end users may experience today.")

<sup>13/</sup> SNET at 5.

<sup>14/</sup> BellSouth Comments submitted in The Bell Atlantic Telephone Companies' Petition to Establish Uniform Dialing Plan From Pay Telephones, RM-6723, at 4 (filed November 22, 1991).

<sup>15/</sup> BellSouth at 19.

<sup>16/</sup> One party proposed an alternative means of implementing BPP that it claims can be implemented promptly, would produce "significant returns on investment," and that is now being  
(continued...)

submitted would be arbitrary and capricious in violation of the Administrative Procedure Act. <sup>17/</sup>

**III. BILLED PARTY PREFERENCE WOULD REQUIRE  
MASSIVE AND IMPROPER CROSS-SUBSIDIZATION**

10. Even one of the most ardent early billed party preference LEC supporters, Bell Atlantic, does not believe that BPP could be self-sustaining. In response to the FCC's observation that BPP might qualify as a "new" service under LEC price caps, <sup>18/</sup> Bell Atlantic warns that costs must be recovered on access for all operator-assisted calls or customers will use other access methods to avoid BPP and these "dial-around" calls "could effectively nullify the exchange carriers' substantial

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<sup>16/</sup> (...continued)

marketed to the BOCs. MessagePhone, Inc. at 2, 4. Given the very high -- \$82.5 to \$135 million -- implementation costs per 150,000 pay telephone lines (id. at 24-25), it is perhaps not surprising that the BOCs did not even mention this alternative in their comments. Moreover, this technology appears to work only with pay telephones, not with aggregator lines, and would still require the use of live operators. See id. at 15. In light of the costs and limitations of this technology, it should not provide the basis for going forward with billed party preference, any more than the familiar Signalling System 7 ("SS7") based billed party preference.

<sup>17/</sup> See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (agency action violates the Administrative Procedure Act if its decision runs counter to the evidence before the agency); Greater Boston Television v. FCC, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971). See also David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Similarly, if the Commission fails to consider adequately this important issue raised by CNS and others it will have acted unlawfully. This is because when an agency fails to consider an important argument, its decision must be rejected as arbitrary and capricious. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43; Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962).

<sup>18/</sup> Notice, 7 FCC Rcd at 3031 n.30.

investment in billed party preference and make their costs unrecoverable." <sup>19/</sup>

11. Because of their great concern that BPP is not economically justifiable on its own merits, the LECs offer a variety of proposals for recovering their BPP costs by raising the rates for services that have little or nothing to do with billed party preference in order to avoid charging the supposed "beneficiaries" of BPP the full costs attributable to BPP. These proposals to "cross-subsidize" include higher switched access rates for all carriers regardless of whether they receive any traffic through BPP; <sup>20/</sup> per call charges on all interLATA "0" traffic, including "10XXX 0+" calls that would not use the BPP system; <sup>21/</sup> and increases in the end user common line charge on all telephone customers -- including those that do not make any operator-assisted calls. <sup>22/</sup> By seeking to recover the "huge" costs associated with implementing and operating BPP by raising the rates for these various non-BPP services, LECs are attempting to shift the costs away from those few customers who might -- at least in theory -- benefit from BPP and onto all carriers and customers.

12. These proposals to increase non-BPP service rates to pay for billed party preference are wholly unjustified and must

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<sup>19/</sup> Bell Atlantic at 6-7.

<sup>20/</sup> GTE at 13; SNET at 5.

<sup>21/</sup> Bell Atlantic at 6-7; GTE at 13; Sprint at 21.

<sup>22/</sup> Nynex at 4.

be rejected both because they would be economically inefficient and because they would be contrary to the Commission's policies against cross-subsidization. <sup>23/</sup> Furthermore, they should be rejected because the enormous costs associated with BPP are unjustifiable since callers can already reach their preferred OSP from any public telephone in the country. <sup>24/</sup> Finally, to order such cross-subsidization in the face of the evidence in this proceeding would constitute arbitrary and capricious agency decision-making contrary to the Administrative Procedure Act.

**IV. THE BENEFITS OF BILLED PARTY PREFERENCE ARE ILLUSORY  
BUT ITS IMPLEMENTATION COSTS WOULD BE REAL AND ENORMOUS**

13. In the Notice, the Commission identified three possible benefits of billed party preference. First, BPP might be simpler and more "user-friendly" for callers. <sup>25/</sup> Second, BPP might focus competition away from payphone providers and aggregators toward end users. <sup>26/</sup> Third, BPP might increase competition in

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<sup>23/</sup> See, e.g., Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7572 (1991), app pndg; American Telephone and Telegraph Private Line Rate Cases, 61 FCC 2d 587, 589 (1976) (subsequent history omitted).

<sup>24/</sup> Because of the FCC's implementation of the unblocking requirements of the Telephone Operator Consumer Services Improvement Act of 1990 ("Operator Services Act"), callers can now reach their preferred interexchange carrier ("IXC") by dialing an "800" or "950" number. Moreover, with "10XXX" unblocking callers will have yet another, universally available method to reach their preferred carriers. See CNS at 4. In fact, this ease of access to alternative carriers was one major reason why BellSouth switched its position and now opposes BPP. See BellSouth at 3, 19.

<sup>25/</sup> Notice, 7 FCC Rcd at 3030.

<sup>26/</sup> Id.

the operator services marketplace. <sup>27/</sup> The comments in this proceeding demonstrate that BPP's three purported benefits are nonexistent and that instituting billed party preference would instead confuse callers and delay their calls, reduce the number of telephones available to the public, and eliminate new and innovative competitors from the OSP marketplace.

**A. BILLED PARTY PREFERENCE WOULD NOT BE  
"USER-FRIENDLY" BECAUSE IT WOULD  
FRUSTRATE CALLERS AND DELAY THEIR CALLS**

14. Given the complex and costly technology needed to implement BPP, as well as the many unresolved deployment issues, <sup>28/</sup> BPP would likely never be universally available. A fundamentally important cause of BPP's piecemeal availability is that the FCC simply lacks the jurisdictional authority to compel universal BPP. Since it is technically possible to segregate interstate and intrastate "0+" services, it is unlikely the FCC lawfully can preempt the states' jurisdiction over implementation of BPP for intrastate operator-assisted telephone calls, even if it were inclined to do so as a matter of public policy. <sup>29/</sup> Indeed, the LECs have apparently not proposed to implement

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<sup>27/</sup> Id. at 3030-31.

<sup>28/</sup> See GTE at 4.

<sup>29/</sup> See Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368 (1986). See also "Resolution Regarding Billed Party Preference" by the National Association of Regulatory Utility Commissioners' ("NARUC") Executive Committee ("NARUC Resolution") (adopted July 29, 1992), reprinted in NARUC Bulletin, No. 32-1992, August 10, 1992, at 5 ("The FCC does not have jurisdiction over intrastate billed party preference"); and Intellicall, Inc. at 11-12.

intraLATA billed party preference. As one LEC points out, although some state regulators appear to support BPP, <sup>30/</sup> this enthusiasm "may decrease if the lion's share of the costs of billed party preference were to be recovered through state rates" since most LEC costs would be allocated to the intrastate jurisdiction. <sup>31/</sup>

15. The conclusion that state PUCs will be unlikely to implement BPP if it would significantly increase intrastate rates is inescapable in light of the resolutions adopted at NARUC's Executive Committee meeting held recently in Seattle, Washington. At that meeting, NARUC's Executive Committee adopted a formal resolution stating that, although it "supports in principle" nationwide BPP, it recognized that industry comments filed in this proceeding estimate that BPP implementation could cost \$1 billion or more. <sup>32/</sup> As a result, NARUC's Executive Committee stated that it "reserves judgment on supporting BPP implementation until there is a more concrete determination of the costs and, the specifics of implementation." <sup>33/</sup> In addition, it has resolved to file comments requesting the Commission to "fairly assign related costs and responsibilities

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<sup>30/</sup> See, e.g., Florida Public Service Commission at 7; Illinois Commerce Commission, Indiana Utility Regulatory Commission, Public Utilities Commission of Ohio, and Public Service Commission of Wisconsin at 15; Missouri Public Service Commission at 8.

<sup>31/</sup> US West Communications, Inc. ("US West") at 19 n.24.

<sup>32/</sup> NARUC Resolution at 5-6.

<sup>33/</sup> Id.

[of BPP] among the different jurisdictions and carriers," i.e., to reserve to the states the decision whether to require BPP to be implemented for intrastate BPP and how the costs of such implementation (if required) would be recovered. <sup>34/</sup>

16. Furthermore, BPP will not be available for interLATA service on anything close to a universal basis. Many smaller LECs and IXC's will not be able to afford the costly software upgrades needed to implement the SS7 technology required by BPP. <sup>35/</sup> In addition, it is doubtful that BPP would be universally implemented for domestic, non-calling card calls, such as coin-sent paid calls. <sup>36/</sup>

17. Moreover, it is unlikely that BPP would ever be extended to international-originated or commercial credit card calls. This is because for calls to be billed to foreign-issued calling cards and for international operator-assisted calls to be billed to an international number, there would have to be information in LIDB regarding the preferred carrier for every foreign telephone number and foreign calling card. <sup>37/</sup> Similarly, BPP could not be implemented for calls to the United States that originate outside of the U.S. <sup>38/</sup> In the case of

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<sup>34/</sup> Id. at 6.

<sup>35/</sup> See GTE at 9; OPASTCO at 2.

<sup>36/</sup> See MCI at 6 ("It is not feasible for BPP to apply to coin-paid 0+ calls and, therefore, these calls should be carried by the carrier prescribed to the phone").

<sup>37/</sup> MCI at 6-7.

<sup>38/</sup> Id. at 7.



commercial credit card calls, even The Ameritech Operating Companies ("Ameritech"), one of the strongest BPP supporters, have recognized that there are "complex issues" that would have to be resolved before such calls could be subject to BPP. <sup>39/</sup> These issues presumably include various "technical obstacles" <sup>40/</sup> and the modification, at substantial cost, of switches and billing systems that would be needed to accommodate commercial credit cards. <sup>41/</sup> Because of these problems, some carriers propose delaying the implementation of BPP for international calls and credit card calls, <sup>42/</sup> while other LECs and IXC's do not believe that BPP should ever be extended to these calls. <sup>43/</sup> Thus, because BPP will never be universally available, its implementation for some calls would needlessly complicate, rather than simplify, dialing patterns for callers. This is because if the Commission mandates BPP, callers would be confronted with a system where, unlike dialing an "800" or "950" access code, dialing "0+" would sometimes result in calls being carried by their preferred carrier and sometimes not.

18. This patchwork type of system is precisely what the traveling public does not want or need as it will result in

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<sup>39/</sup> Ameritech at 11.

<sup>40/</sup> BellSouth at 16.

<sup>41/</sup> Pacific Bell at 18-19.

<sup>42/</sup> See, e.g., Ameritech at 11.

<sup>43/</sup> See, e.g., BellSouth at 18-19; MCI at 6-7; Pacific Bell at 16.

frustration and delay. In contrast, the record demonstrates that the public has adapted well to using access codes to reach their preferred carrier. For example, Bellcore conducted four focus group sessions of frequent users of calling cards in 1991 and concluded that "[a]ccess code dialing was not viewed as a significant issue by the respondents, many of whom routinely used this method . . . ." <sup>44/</sup>

19. The record in this proceeding also demonstrates that even if it were made available, BPP would delay, not speed-up, call processing. The record shows that the time savings achieved by not having to dial an access code for certain calls would be outweighed by the increased call processing time <sup>45/</sup> -- largely because of the need for two operators for many calls. <sup>46/</sup> While call processing delays could be remedied somewhat through the use

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<sup>44/</sup> BellSouth at 9. As a result of universal, relatively easy access to preferred OSPs, BPP is unnecessary regardless of AT&T's market share. Even if callers cannot reach the carrier of their choice on a "0+" basis, they can do so using an "800" or "950" access code. Moreover, if -- as urged by CNS and many others -- the FCC adopts "0+" public domain as proposed in the Notice in this proceeding, then all "0+" cardholders will be able to have their calls completed from any public telephone in the country. See Notice, 7 FCC Rcd at 3033-34.

<sup>45/</sup> See US West at 13; BellSouth at 15.

<sup>46/</sup> In contrast to "800," "950" and "10XXX" access, a billed party preference system would result in substantial delays and inconvenience for callers placing interexchange collect, third-party billed, and credit card calls because their calls would be routed first to a LEC operator, then to the appropriate OSP operator for completion. See, e.g., GTE at 9; Competitive Telecommunications Association ("CompTel") at 14-16; CNS at 5. If BPP were implemented, additional LEC operators would have to be hired to handle the increased demand for carrier identification not capable of being handled on a mechanized basis. See Nynex at 10.

of Automated Alternate Billing Services ("AABS"), a BPP-compatible version of AABS would have to be developed. <sup>47/</sup> This would increase further BPP's already high implementation costs. Furthermore, because AABS may not have the capability to forward a caller's name, calls that are collect, third party, and person to person would require callers to repeat their name to two different operators. <sup>48/</sup> Because these non-credit card calls are a substantial part of the operator services market (e.g., approximately 68% of OSPs' traffic involve calls that require live operator assistance), <sup>49/</sup> billed party preference will greatly inconvenience most operator service customers and delay their calls.

**B. BILLED PARTY PREFERENCE WOULD BE CONTRARY TO PUBLIC POLICY, WOULD DECREASE THE NUMBER OF PUBLIC TELEPHONES, AND WOULD THREATEN PUBLIC SAFETY**

20. The FCC cites as a potential benefit of BPP the possibility that competition might be refocused on end users rather than on aggregators and pay telephone owners. <sup>50/</sup> If the Commission is concerned about the rates of OSPs, then -- as CNS and other OSPs have urged repeatedly -- it should take action

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<sup>47/</sup> Ameritech at 14. See also American Telephone and Telegraph Company ("AT&T") at 15 n. \*. In any event, AABS does not eliminate the need for two operators, it simply mechanizes some of the operator functions. BellSouth at 14; GTE at 9.

<sup>48/</sup> US West at 8-9.

<sup>49/</sup> CNS at 5; CompTel at 15-16.

<sup>50/</sup> This argument ignores the fact that the LECs themselves have always paid commissions -- albeit sometimes referring to them by various euphemisms. See Intellicall at 16-17.

that will lower, not raise, OSPs' costs. <sup>51/</sup> It should not take action that will greatly reduce the number of public telephones and consequently jeopardize public safety in some areas.

21. If aggregators and payphone owners are not permitted to receive an adequate return on their investments in telecommunications equipment, they will have no incentive to continue providing such equipment or service. Prior to the development of a competitive pay telephone market, the number of pay phones decreased to such an extent that in some jurisdictions state public service commissions had to require LECs to have at least one pay phone in each local exchange. <sup>52/</sup> With the advent of competition in the operator services market, the number of pay phones has grown significantly, providing an essential service to an increasingly mobile population and to those who cannot afford to have their own telephone. <sup>53/</sup> The FCC should not frustrate either the public's desire for conveniently located, properly functioning public telephones, or the independent payphone providers' desire to furnish these services in competition with

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<sup>51/</sup> Examples of such cost-reducing action would be to require LECs to provide billing and collection services to OSPs on a nondiscriminatory basis and -- as being considered in the expedited phase of this docket -- to require IXCs to provide validation and billing information for "0+" calling cards on a nondiscriminatory basis. See Notice, 7 FCC Rcd at 3033-34; CNS's Comments submitted in CC Docket No. 92-77 regarding the "0+" public domain proposal at 3-7 (filed June 2, 1992).

<sup>52/</sup> See Midwest Independent Coin Payphone Association at 2-3.

<sup>53/</sup> See The City of New York Department of Telecommunications and Energy at 10-11.

the local exchange carriers, by requiring the implementation of BPP.

22. Furthermore, implementation of BPP would, in certain circumstances, threaten public safety. If, for example, BPP is applied to calls made from prison pay telephones, BPP would allow inmates to commit fraud and to harass their victims, judges, and prosecutors. <sup>54/</sup> Similarly, network reliability concerns arise because BPP employs SS7 technology, which has in the past failed and paralyzed operations and safety controls at airports around the nation. <sup>55/</sup> Finally, to the extent that BPP leads to the removal of public telephones in poor areas where households have no residential telephone service, it eliminates the residents' ability to summon emergency services. <sup>56/</sup> Thus, not only would BPP inconvenience travellers by reducing the number of public telephones, but it could constitute a real threat to public safety.

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<sup>54/</sup> See, e.g., Arizona Department of Corrections at 2-6.

<sup>55/</sup> See The Greater Orlando Aviation Authority at 8.

<sup>56/</sup> See The City of New York Department of Telecommunications and Energy at 11. In certain sections of New York City, as many as 20% of households do not have residential phone service. Id. In inner city areas of New York City, privately owned pay telephones represent about 40% of phones available for public use. See Independent Payphone Association of New York, Inc. at 4 n. 3. Therefore, any reduction in the number of these telephones could seriously endanger public safety.

**C. IMPLEMENTING BILLED PARTY PREFERENCE COULD HAVE A DEVASTATING IMPACT ON THE COMPETITIVE "0+" MARKET**

23. In its Notice, the Commission suggests that billed party preference might "increase parity in the operator services marketplace." <sup>57/</sup> The record in this proceeding, however, demonstrates that implementation of billed party preference would have the opposite effect -- it would likely force out of the market those companies that have focused primarily on operator services. This conclusion is made clear even by the comments of LECs and IXCs that support BPP because under their proposed implementation plans BPP would transform the "0+" market into a mere adjunct of the "1+" market.

24. In theory, BPP permits cardholders to select primary and secondary "0+" carriers in addition to their "1+" carrier. The practical fallacy of this theory is made clear by the comments filed in this proceeding. While MCI, Sprint, GTE, and all of the BOCs except BellSouth support the theoretical right of cardholders to choose different "0+" carriers than "1+" carriers, the only systems they believe to be economically practicable for providing customers with a "choice" of 0+ carriers would ensure that the vast majority of calling card customers would be automatically defaulted to their "1+" carrier. <sup>58/</sup> Ameritech believes (without citation to any evidence) "that the vast majority of customers will desire to use their presubscribed

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<sup>57/</sup> Notice, 7 FCC Rcd at 3030.

<sup>58/</sup> See, e.g., Ameritech at 9; MCI at 8; Nynex at 11; Pacific Bell at 14; Southwestern Bell at 20; Sprint at 32-33.

carrier as their BPP OSP, and therefore propose[s] to assign the billed party's prescribed carrier as its BPP OSP, unless the customer requests otherwise." <sup>59/</sup> However, if the primary goal of BPP is to increase competition in the "0+" market, then it would be erroneous for the Commission to assume that a customer's preferred "0+" carrier would be the same as its "1+" carrier. By assuming that customers will chose the same carrier for their "0+" calls as for their "1+" calls, the LECs' proposed "notification" system confirms the fundamental fallacy that BPP will promote competition among OSPs.

25. While the proposal to permit a "primary" OSP to designate one or more "secondary" OSPs <sup>60/</sup> could, in theory, allow regional OSPs to survive and has attracted some LEC support, <sup>61/</sup> in practice this proposal is also unworkable. <sup>62/</sup> Even if a regional OSP were designated as a primary "0+" carrier, there is no evidence in the record that any other carrier would agree to act as its secondary carrier. This is not surprising

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<sup>59/</sup> Ameritech at 9. See also Pacific Bell at 14 (Because "[b]alloting is extremely expensive" Pacific Bell believes that the "better approach would be to initialize LIDB with the customer's 1+ presubscribed IXC, but allow OSPs to advertise to customers that they have a right to have a different carrier for their 0+ service."); Southwestern Bell at 20; SNET at 9.

<sup>60/</sup> See Notice, 7 FCC Rcd at 3033.

<sup>61/</sup> See, e.g., Ameritech at 9-10; Pacific Bell at 15; GTE at 6-7.

<sup>62/</sup> Ironically, those carriers that argue that BPP would be beneficial for the public because it allows the billed party to select its preferred carrier also argue that the primary carrier, not the billed party, should select the secondary carrier that the caller will use in areas not served by the primary carrier. See, e.g., Ameritech at 2, 9-10.

because OSPs, unlike LECs, compete against one another in overlapping territories. This makes the prospect of "partnership agreements" being formed between them highly improbable. In fact, none of the "Big Three" IXC's has volunteered to serve as a secondary carrier for regional OSPs. Indeed, these national OSPs have no economic incentive to serve as secondary carriers when, by refusing, they will likely obtain directly the cardholders' business.

26. As a result, by imposing BPP on the public the Commission would relegate by regulatory fiat the operator services industry to be a mere appendage of the "Big Three" carriers' "1+" services -- a result that would not be in the public interest. <sup>63/</sup> Moreover, the FCC cannot lawfully implement BPP based on its assumption -- unsupported by any evidence in the record -- that competition will increase with BPP because carriers will somehow form partnership agreements with each other. <sup>64/</sup>

27. If BPP were implemented and the "0+" market were absorbed into the "1+" market, innovation in the operator

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<sup>63/</sup> Billed party preference would likely be equally devastating for smaller regional "1+" carriers that provide operator services to their customers using independent OSPs. Customers desiring to have a single carrier provide "0+" and "1+" services would transfer their business to the "Big Three" carriers to the detriment of smaller, regional "1+" carriers. See CNS at 21-22.

<sup>64/</sup> See City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1168 (D.C. Cir. 1987) (reversing and remanding decision where FCC "acted irrationally in glossing over gaping holes" in the record); Aeron Marine Shipping Co. v. United States, 695 F.2d 567, 577-80 (D.C. Cir. 1982) (finding arbitrary and capricious agency decision that lacked adequate factual predicate).



services market would diminish substantially or disappear completely. Given its basic incompatibility with smart pay telephones, BPP would eliminate that OSP technology from the market. <sup>65/</sup> Moreover, the regional OSPs that introduced most innovative services in the OSP industry would be eliminated from the marketplace. Because operator services are a relatively small percentage of the Big Three IXCs' revenues, these IXCs would have far less incentive to develop new technology and services in this area than those carriers whose existence principally depend on the provision of operator services. Thus, implementation of BPP would destroy both competition and innovation within the operator services industry. The Commission should safeguard the vitality of the "0+" marketplace by not requiring that billed party preference be implemented.

**V. BILLED PARTY PREFERENCE WOULD BE UNLAWFUL AND INCONSISTENT WITH IMPORTANT FCC POLICIES**

28. Because billed party preference would not deliver any of its promised benefits, would worsen service, and cost businesses and consumers billions of dollars, the Commission cannot lawfully order its implementation. Should the FCC order BPP to be implemented despite the overwhelming record evidence against it, this would constitute arbitrary and capricious agency action in violation of the Administrative Procedure Act. <sup>66/</sup>

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<sup>65/</sup> See Intellicall at 9.

<sup>66/</sup> See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983); Greater Boston Television v. FCC, 444 F.2d 841, 852 (D.C. Cir.) cert. denied, 403 U.S. 923

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